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ALEXANDER L. STEVAS,
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No.

in the
Supreme Court
of the
United States

ALEX MORNINGSTAR,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF FLORIDA

JOSEPH A. VARON, ESQ.
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QUESTION PRESENTED

WHERE THERE IS NO CRIME IN FLORIDA SUCH AS "ATTEMPTED TRAFFICKING IN STOLEN PROPERTY" A CONVICTION THEREFOR CONSTITUTES A VIOLATION OF DUE PROCESS WITHIN THE PURVIEW OF THE FIFTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION.

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**PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF FLORIDA**

TO: Honorable Chief Justice and Associate Justices
of the Supreme Court of the United States

Petitioner, ALEX MORNINGSTAR, prays a Writ
of Certiorari issue to review a Final Judgment of the
Supreme Court of Florida which refuses to review
Petitioner's conviction to a non-existent offense.

In a written opinion the Fourth District Court of Appeal of Florida affirmed the Trial Court's (i.e., Circuit Court of the Seventeenth Judicial Circuit of Florida) conviction of "Attempted Trafficking in Stolen Property", but in so doing certified a question of law to the Supreme Court of Florida on another point unrelated to the thrust of this application for certiorari.

In obedience to the order of the Supreme Court of Florida in accepting jurisdiction, all parties were required to file briefs and Petitioner raised the issue that the conviction of "Attempted Trafficking in Stolen Property" as prohibited by the applicable Florida Statute was a non-existent offense. The Supreme Court of Florida did not pass on that particular point and Petitioner's request for rehearing which reiterated the critical point (App. 1) was denied by the Supreme Court of Florida on April 13, 1983 (App. 2).

JURISDICTION OF THIS COURT

This application for certiorari is filed within sixty (60) days of the Supreme Court of Florida's denial of Petitioner's Petition for Rehearing which was rendered on April 13, 1983.

The jurisdiction of this Court is invoked, made and conferred under Title 28 U.S.C. §1257(3) and this Court's Rules 17 through 23.

CONSTITUTIONAL AMENDMENTS INVOLVED

FIFTH AMENDMENT

The Fifth Amendment to the United States Constitution provides, inter alia:

"No person . . . (shall) be deprived of life, liberty, or property, without due process of law;"

FOURTEENTH AMENDMENT

The Fourteenth Amendment to the United States Constitution provides, inter alia:

". . . nor shall any State deprive any person of life, liberty, or property, without due process of law;"

STATEMENT OF FACTS

Petitioner, ALEX MORNINGSTAR, was indicted by the State of Florida for the offense of Trafficking or Endeavoring to Traffic in Stolen Property, to wit: one yellow diamond ring and one pearl ring, in violation of Florida Statutes 812.019(1) which provides as follows:

"812.019 DEALING IN STOLEN PROPERTY

(1) Any person who traffics in, or endeavors to traffic in, property that he knows or should know was stolen shall be guilty of a felony of the second degree, punishable as provided in ss. 775.082, 775.083, and 775.084." (Underscoring ours)

The jury, apparently exercising its "jury pardon" prerogative, returned a verdict finding Petitioner guilty of the charge of "*Attempted Trafficking in Stolen Property*".

The verdict, judgment of conviction and sentence was appealed to the Fourth District Court of Appeal of Florida who affirmed the conviction but certified to the Supreme Court of Florida a question of public importance on another point, which is not germane here.

The Florida Supreme Court affirmed Petitioner's conviction but in its order of affirmance did not pass upon the thrust of Petitioner's complaint that he was convicted of an offense that was non-existent in the State of Florida. A Petition for Rehearing was filed with the Supreme Court of Florida (App. 1), which the Florida Supreme Court denied on April 13, 1983 (Ap. 2).

REASONS FOR GRANTING THE WRIT

The Florida courts in dealing with F.S. §812.019 (the same statute under which Petitioner was charged) have held in *Ervin v. State*, 410 So.2d 510 (Fla. 2d DCA 1981) and in *Miles v. State*, 374 So.2d 1167 (Fla. 2d DCA 1979) that the Legislature's use of the word "endeavors" in the Thefts Statute was equivalent to the use of the word "attempts" and the courts further held that to *endeavor* to do something means to make an *attempt* to do it.

Under this rationale there can be no *attempt* to commit an *attempt* to do something. There can be no *attempt to endeavor* to do something.

The Florida Supreme Court has even held in *State v. Thomas*, 362 So.2d 1348 (Fla. 1978) that when the definition of a major offense charged includes the *attempt* to commit that act, there can be no separate crime of *attempt*.

In a case of later vintage the Supreme Court of Florida unequivocally established that "if a crime is itself an attempt to do an act or accomplish a result, there can be no lesser included offense of attempting to commit that crime. *Pagano v. State*, 387 So.2d 349 (Fla. 1980).

What we have here, is the Petitioner being convicted of an *attempt to endeavor* to traffic in stolen property. There is no such offense in the State of Florida. The same rationale was reiterated in the case of *Adams v. Murphy, Sheriff of Osceola County, Florida*, 653 F.2d 224 (5th Cir. 1981) where the Court held that "nowhere in this country can a man be condemned of a non-existent crime".

CONCLUSION

The Florida Supreme Court in denying Petitioner's Petition for Rehearing (App. 2) which embodied the claim of a "non-existent offense" went directly contrary to its rulings in *State v. Thomas, supra*, and *Pagano v. State, supra*.

The Writ of Certiorari should be granted so that Petitioner may not be convicted of a "non-existent crime."

Respectfully submitted,

VARON, BOGENSCHUTZ,
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2432 Hollywood Boulevard
Hollywood, Florida 33020
Telephone: (305) 923-1548
Counsel for Petitioner

By: /s/ Joseph A. Varon
JOSEPH A. VARON

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have mailed three (3) copies of this Petition for Writ of Certiorari to Honorable Jim Smith, Attorney General of the State of Florida, The Capital, Tallahassee, Florida 32301, this 31 day of May, 1983.

JOSEPH A. VARON

JOSEPH A. VARON

APPENDIX 1

IN THE SUPREME COURT OF FLORIDA

Case No. 61,488

ALEX MORNINGSTAR,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

PETITION FOR REHEARING

NOW COMES the Petitioner, ALEX MORNINGSTAR, by his undersigned counsel and respectfully submits herewith his Petition for Rehearing from this Honorable Court's opinion dated September 23, 1982, and in support thereof says:

1. Petitioner was heretofore convicted by a jury of "Attempted Trafficking in Stolen Property", as prohibited by Section 810.019, Florida Statutes, (1977).

2. In Petitioner's appeal from said conviction to the District Court of Appeal of the State of Florida, Fourth District, two important issues were raised, viz:

(a) Challenge the correctness of the Trial Court's denial of a motion to suppress evidence resulting from electronic interceptions of his conversations; and

(b) That "Attempted Trafficking in Stolen Property" as prohibited by Section 810.019, Florida Statutes (1977), is a nonexistent offense.

3. The District Court of Appeal of the State of Florida, Fourth District, affirmed Petitioner's conviction but did not reach or mention the issue concerning the fact that Petitioner was convicted of a nonexistent offense.

4. The District Court of Appeal of the State of Florida, Fourth District, did, however, certify a question of law to be of great public interest to this Honorable Court on the question of interception of a private communication emanating from a location other than a defendant's home.

5. After this Honorable Court accepted jurisdiction and briefing schedules were delineated, Petitioner duly filed Brief for Certiorari on the Merits and at Point III of said Brief Petitioner expressed his intention to argue conflict jurisdiction, citing the decisions that were in conflict with the written opinion of the Fourth District Court of Appeals.

The Attorney General filed an emergency motion to strike that portion of the Brief, contending that this Honorable Court should only consider the issue contained within the purview of the certified question. On January 18, 1982, this Honorable Court denied Respondent's emergency motion to strike.

6. This Honorable Court did not entertain, review or pass upon the question of conflict certiorari. This

segment of Petitioner's Brief was entirely overlooked or disregarded, leaving Petitioner with a conviction against him of a nonexistent offense.

This Honorable Court has before it on certiorari the case of *Sykes v. State*, 397 So.2d 991, from the District Court of Appeal of Florida, First District, where the Defendant was convicted of an *attempt* to commit an offense, when *the attempt* to commit the offense is part of the substantive crime itself, creating a conviction of a nonexistent offense. Oral argument was had before this Honorable Court on the *Sykes* case in January of 1982. This Court's opinion in *Sykes* will be dispositive of the question in the instant case, namely:

"Is not a conviction of Attempted Trafficking in Stolen Property as prohibited by Section 810.019, Florida Statutes, (1977), a nonexistent offense?"

If so, then Petitioner is entitled to be discharged.

CONCLUSION

In *Ervin v. State*, 410 So.2d 510 (2DCA, 1981), it was held that defendant's conviction for *Attempted Dealing in Stolen Property* was void and constituted fundamental error in the respect it constitutes a nonexistent crime.

In *Achin v. State*, Supreme Court Case No. 59,840, decided January 21, 1982, this Honorable Court held that a defendant may not be convicted of a nonexistent offense and ordered a retrial.

We respectfully submit that this Honorable Court consider this Petition for Rehearing and withhold ruling until such time as the *Sykes* case has been resolved by this Honorable Court, as *Sykes* will be dispositive of our complaint.

I HEREBY CERTIFY that a copy of the foregoing Petition for Rehearing was furnished by mail to Joy B. Shearer, Esq., Assistant Attorney General, 111 Georgia Avenue, Suite 204, West Palm Beach, Florida 33401, this 1 day of October, 1982.

Respectfully submitted,

VARON and STAHL, P.A.
2432 Hollywood Boulevard
Hollywood, Florida 33020
Telephone: (305) 923-1548

Counsel for Petitioner

By: /s/ Joseph A. Varon

JOSEPH A. VARON

APPENDIX 2
IN THE SUPREME COURT OF FLORIDA
WEDNESDAY, APRIL 13, 1983

CASE NO. 61,488

District Court of Appeal,
4th District — No. 79-2360

ALEX MORNINGSTAR,
Petitioner,

vs.

STATE OF FLORIDA,
Respondent.

On consideration of the petition for rehearing filed
by attorney for petitioner, and response thereto,

IT IS ORDERED by the Court that said petition
be and the same is hereby denied.

A True Copy

TEST:

Sid J. White
Clerk Supreme Court

By: /s/ [illegible]
Deputy Clerk

c
cc: Hon. Clyde L. Heath, Clerk
Hon. Robert E. Lockwood, Clerk
Hon. Robert W. Tyson, Jr., Judge

Joseph A. Varon, Esquire
of Varon & Stahl
Stewart J. Bellus, Esquire

Office - Supreme Court, U.S.

FILED

JUN 26 1983

ALEXANDER L. STEVAS.

CLERK

No. 82-1956

in the
Supreme Court
of the
United States

ALEX MORNINGSTAR,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

SUPPLEMENTAL APPENDIX TO
PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF FLORIDA

JOSEPH A. VARON, ESQ.
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Counsel for Petitioner

APPENDIX A
SUPREME COURT OF FLORIDA

No. 61,488

ALEX MORNINGSTAR,
Petitioner,

vs.

STATE OF FLORIDA,
Respondent.

[September 23, 1982]

EHRlich, J.

We have for review the decision of the District Court of Appeal, Fourth District, in *Morningstar v. State*, 405 So.2d 778 (Fla. 4th DCA 1981), which affirmed the conviction of petitioner for attempted trafficking in stolen property and certified the following question as being of great public importance:

Does Article I, Section 12 of the Florida Constitution prohibit reliance upon Section 934.03(2)(c), Florida Statutes (1979) as to the interception of a private communication emanating from a location other than the defendant's "home"?

405 So.2d at 782.¹ We have jurisdiction. Art. V, §3(b)(4), Fla. Const. We answer that question in the negative and affirm the holding of the district court.

Alex Morningstar is a jeweler and pawnbroker. He accepted two pieces of jewelry for pawn from Peter Salerno, a known burglar. Neither piece of jewelry was resold, but both were kept in petitioner's bank vault.

During the latter part of 1978 the police elicited Salerno's cooperation along with that of another confessed thief, Carmine Stanzione, in an investigation of certain activities of the petitioner. During the course of the investigation, Stanzione and Salerno consented to the

¹Art. I, §12, Fla. Const.:

The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures, and against the unreasonable interception of private communications by any means, shall not be violated. No warrant shall be issued except upon probable cause, supported by affidavit, particularly describing the place or places to be searched, the person or persons, thing or things to be seized, the communication to be intercepted, and the nature of evidence to be obtained. Articles or information obtained in violation of this right shall not be admissible in evidence.

§934.03(2)(c), Fla. Stat. (1979):

It is lawful under this chapter for a law enforcement officer or a person acting under the direction of a law enforcement officer to intercept a wire or oral communication when such person is a party to the communication or one of the parties to the communication has given prior consent to such interception and the purpose of such interception is to obtain evidence of a criminal act.

electronic interception and recordation of conversations they had with the petitioner. The conversations, both telephonic and person to person, took place while Morningstar was in his office at his place of business. The telephonic conversations were recorded by telephone monitors, while the others were recorded by "body bug" which transmitted the sound to a recorder located outside of the building.

Morningstar was subsequently charged with trafficking in stolen property. Before trial, petitioner filed a motion to suppress the evidence resulting from the taped conversations because it was obtained without a search warrant. The motion was denied. At trial, the informants testified and identified the tape recordings, as did the police officers who monitored and recorded the conversations. These recordings were admitted in evidence over objection on the sanction of section 934.03(2)(c) and the consent obtained from Salerno and Stanzone. Morningstar was convicted of attempted trafficking in stolen property and received the maximum sentence of five years.

On appeal, Morningstar challenged the correctness of the trial court's denial of the motion to suppress. The district court affirmed the judgment and certified the foregoing question.

Petitioner maintains that article I, section 12, Florida Constitution, prohibits the warrantless interception of private communications notwithstanding the provision of section 934.03(2)(c). Furthermore, he argues the doctrine set forth in *State v. Sarmiento*, 397 So.2d 643 (Fla. 1981), is broad enough to extend that protection to

one's private business office, because there also one has a "reasonable expectation of privacy" and it is likewise a place where one often relaxes, retreats and expresses one's inner thoughts.

We disagree. In *Sarmiento*, this Court held that the warrantless electronic interception by the state agents of a conversation between the defendant and an undercover police officer in the defendant's home was an unreasonable interception of defendant's private communications in violation of article 1, section 12, Florida Constitution, and that the defendant's home was an area specifically protected by Florida's constitution. That constitutional protection of the home, recognized in *Sarmiento*, does not extend to the defendant's office or place of business. We hereby hold section 934.03(2)(c) constitutional under these facts. Although Morningstar may have maintained a reasonable expectation of privacy in his private office, that expectation under these circumstances is not one which society is willing to recognize as reasonable or which society is willing to protect. See *U.S. v. Katz*, 389 U.S. 347 (1967). See also *Hill v. State*, No. 60,144 (Fla. July 15, 1982).

We approve the decision of the District Court of Appeal. ALDERMAN C.J., ADKINS, BOYD, OVERTON and McDONALD, JJ., Concur
NOT FINAL UNTIL TIME EXPIRES TO FILE
REHEARING MOTION AND, IF FILED,
DETERMINED.

Application for Review of the Decision of the District
Court of Appeal — Certified Great Public Importance

Fourth District — Case No. 79-2360

Joseph A. Varon of Varon and Stahl, Hollywood, Florida,

for Petitioner

Jim Smith, Attorney General; and Andrea T. Mohel
and Joy B. Shearer, Assistant Attorneys General, West
Palm Beach, Florida,

for Respondent

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have mailed three copies of this Supplemental Appendix to Petition for Writ of Certiorari to the Supreme Court of Florida to Honorable Jim Smith, Attorney General of the State of Florida, The Capitol, Tallahassee, Florida 32301, this 27th day of June, 1983.

JOSEPH A. VARON

JOSEPH A. VARON